

1934219 (Migration) [2021] AATA 2552 (21 May 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
CASE NUMBER:	1934219
MEMBER:	Justine Clarke
DATE:	21 May 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

Statement made on 21 May 2021 at 3:05pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – Schedule 3 criteria – application lodged outside of relevant timeframe – compelling reasons for waiver – long-standing partner relationship – sponsor’s daughter with disability – sponsor’s reliance on the applicant – applicant’s immigration history – periods of unlawfulness – decision under review remitted

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 65

Migration Regulations 1994 (Cth), Schedule 2, cls 820.211; Schedule 3, Criterion 3001

CASES

Babicci v MIMIA (2005) 141 FCR 285

MZYPZ v MIAC [2012] FCA 478

Plaintiff M64/2015 v MIBP [2015] HCA 50

Waensila v MIBP [2016] FCAFC 32

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made on 18 November 2019 by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (Cth) (the Act).
3. At the time of this decision, the applicant is a [age]-year-old national of Sri Lanka.
4. On 8 November 2016, the applicant applied for the visa based on his relationship with his sponsor, [Ms A]. At the time of this decision, the sponsor is [age] years of age.
5. At the time of application, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. The primary criteria include cl.820.211 of Schedule 2 to the Regulations.
6. The applicant provided the Tribunal with a copy of the primary decision. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(d) of Schedule 2 to the Regulations. Specifically, the delegate found that the applicant did not meet cl.820.211(2)(d)(ii) because he did not meet Schedule 3 criterion 3001 in that he ceased to hold a substantive visa more than 28 days prior to lodging the visa application. The delegate considered the applicant's claims that there were compelling reasons for waiving the Schedule 3 criteria, but the delegate was not satisfied that there were compelling reasons that justified the waiver of the Schedule 3 criteria.
7. Further, the delegate stated:
 8. To meet the requirements of subclause 820.211(2), you must satisfy each of paragraphs (a), (c) and (d). In consideration of the relevant legislation and the evidence before me, I find that you do not meet the requirements of subclause 820.211(2)(a) and 820.211(2)(d) or any of the alternative provisions within regulation 820.211.
9. The Tribunal takes the view that the reference to cl 820.211(2)(a) is erroneous as there is no reasoning in relation to this criterion. In this review, the Tribunal has proceeded on the basis that the refusal was on cl 820.211(2)(d) only as all the delegate's reasoning relates to this criterion and uses headings relevant to this criterion only.
10. On 3 December 2019, the applicant applied to the Tribunal for review of the primary decision. The applicant was professionally represented in relation to the review.
11. Due to the COVID-19 pandemic, the Tribunal did not hold an in-person hearing. On 2 February 2021, the applicant appeared, by video, before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor. Both the applicant and the sponsor attended the video hearing from the representative's office and the representative was also present at the hearing.
12. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Does the applicant meet Schedule 3 criteria, or are there compelling reasons for not applying those criteria?

13. An applicant who is not the holder of a substantive visa at the time of application must meet certain criteria in Schedule 3 to the Regulations. With limited exceptions not relevant to this case, he or she must satisfy Schedule 3 criteria 3001, 3003, and 3004 unless the Minister is satisfied that there are compelling reasons for not applying those criteria: cl 820.211(2)(d).
14. It is not in dispute that the applicant in the present case did not have a substantive visa at the time of application. As the applicant did not enter Australia as the holder of a Subclass 995 visa or special purpose visa, the issue is whether the applicant satisfies the Schedule 3 criteria unless there are compelling reasons for not applying those criteria. These criteria are set out in the attachment to this decision.

Criterion 3001

15. In order to satisfy criterion 3001, the application for the visa must have been lodged within 28 days of the relevant day. The 'relevant day' is defined in 3001(2), as set out in the attachment to this decision.
16. In this case, the relevant day is the day the applicant last held a substantive visa, being 8 June 2012, which was the day before his Student (Class TU) visa ceased. At the hearing, the applicant confirmed that his Student (Class TU) visa had ceased on 9 June 2012. On 8 November 2016, the applicant lodged the visa application which is the subject of this review.
17. As the visa application was not made within 28 days of the relevant day, the applicant does not satisfy criterion 3001.

Compelling reasons

18. As the Tribunal has found that the applicant does not meet the relevant Schedule 3 criteria, it is required to consider whether there are compelling reasons for not applying the criteria.
19. The expression 'compelling reasons' is not defined for these purposes. However, reasons that are compelling should 'force or drive the decision-maker' 'irresistibly' to some end: *Plaintiff M64/2015 v MIBP* [2015] HCA 50 at [31]. The reasons or circumstances should be sufficiently powerful to lead a decision-maker to find that the criteria should not be applied: *MZYPZ v MIAC* [2012] FCA 478 at [10]; *Babici v MIMIA* (2005) 141 FCR 285 at [24]. Circumstances which constitute 'compelling reasons' for not applying the Schedule 3 criteria can arise at any time, including after the visa application is made: *Waensila v MIBP* [2016] FCAFC 32.
20. The Department's Procedures Advice Manual (PAM3) guides decision makers to consider the circumstances that resulted in the applicant becoming unlawful and whether the circumstances are beyond the applicant's control. Notwithstanding, the Tribunal is mindful that it is not bound to follow the Government's policy but rather it is obliged to consider all the circumstances of the case and determine, on the evidence as a whole, whether there are compelling reasons for not applying the Schedule 3 criteria.
21. The Tribunal notes that the Explanatory Statement to Statutory Rules 1996, No 75, which accompanied the introduction of the statutory provisions, gave two examples of circumstances in which a waiver may be justified. One of these examples is that there are

Australian-citizen children from the relationship. However, there is no evidence that the applicant and the sponsor have any children together, so the Tribunal is unable to waive the Schedule 3 criteria for this reason. The other example is that the applicant and sponsor are already in a long-standing partner relationship which has been in existence for two years or longer. At the hearing, when asked what the applicant's claimed compelling reasons were, he noted the length of his relationship with the sponsor and said that the sponsor had experienced difficulties, including having been treated for depression with medication, but that, since their marriage, 'she is doing really great'.

22. In assessing the applicant's claims, the Tribunal has had regard to all documents on the Department's file and the Tribunal's file as well as to the oral evidence given at the hearing. The Tribunal acknowledges that, in this review, it has had the benefit of more evidence than was before the delegate. For example, the Tribunal has had the benefit of reviewing 'to whom it may concern' statements made by [Mr B] (the sponsor's former partner and father of her child); the applicant's friends [Ms C] and [Mr D] as well as from [Ms E], the carer of the sponsor's child.

23. *Long-term partner relationship*

24. In the primary decision, the delegate noted that the applicant and the sponsor had married [in] May 2016.¹ The delegate accepted that the parties were lawfully married and had developed a supportive relationship during difficult times. However, the delegate stated that 'the existence of a marriage certificate or a statement declaring the level of emotional support is not alone a compelling reason for waiving the Schedule 3 criteria'.
25. The Tribunal notes that the applicant and the sponsor have consistently claimed that they met on 18 April 2015 at a named pub in [Suburb 1].² They gave consistent oral evidence in this regard at the hearing as well, including both laughing when the sponsor recounted that she had been a 'bit drunk' and had 'gate-crashed' his party.
26. At the hearing, the applicant said that they had known each other for six years and had been married for five years. He gave oral evidence about the development of the relationship, including saying that the sponsor had wanted to get married because 2016 had been a 'rollercoaster' of a year for her, including because the applicant had had to go to Court that year (as noted in the applicant's immigration history, detailed below). The applicant told the Tribunal that his parents had wanted to have a wedding at their house but that he had been unable to travel from Australia given that he held a Bridging E visa. He said that, instead, it had been a small wedding in [Suburb 2], attended by the sponsor's friend [Ms F] and his three friends [Ms G], [Ms H] and [Ms C]. The Tribunal notes that there is other evidence before the Tribunal corroborating this claim, for example the registered marriage certificate and the Form 888 statutory declaration made on 6 November 2016 by [Ms C] (both on the Department's file). The applicant gave oral evidence that they had celebrated their marriage after the ceremony when they went for dinner at the Country Club in [Suburb 3].
27. The applicant told the Tribunal that he did not move into the sponsor's house until after the marriage. He said that, before the marriage, 'I was at her house most of the weekend'. He said the sponsor had been living at the property in [Suburb 4] for around 13 years and that he had been there for almost 5 years. He explained that it was a Government-owned property and he told the Tribunal the amount of the contribution required per week.

¹The Tribunal notes that the Department's file contains a certified copy of the parties' registered marriage certificate.

²For example, see the Form 47SP; Form 40SP; the jointly signed relationship statement dated 29 October 2016 and the jointly signed request for the waiver of the Schedule 3 criteria, dated 1 February 2017 (all on the Department's file).

28. He said that his parents were 'okay' about the relationship. He said that his parents had not met the sponsor, other than by phone (WhatsApp). He said that this was because he could not leave Australia and his parents could not visit. He noted that he had met some members of the sponsor's family (notably her father and her sister [Ms I]) but he said that the sponsor was not close to her siblings and that she did not speak to her mother.
29. He told the Tribunal that, earlier, they had had a joint account with [Bank 1] but that they had cancelled it and that now their joint bank account was with [Bank 2]. He said that they had opened an account with this bank because the applicant's employer ([Company 1]) has a partnership with the bank and he thought that it would assist them to obtain a home loan. He said that they were saving to buy a house and wished to move from [Suburb 4] to [Suburb 5], where they might be able to open a [specified business] (telling the Tribunal that, in the past, the sponsor had worked as a [Occupation 1]). He lamented the fact that his uncertain visa status meant that it was difficult for them to make plans. The applicant provided detailed oral evidence about the parties' banking arrangements and gave oral evidence suggesting that they had a flexible approach to the payment of their utility bills. He said that they owned no real estate or other major assets. He said that they did not have any joint liabilities. He noted that they had a car, but he said that they had paid the loan and that the car was registered in his name. The applicant said that he had nominated the sponsor as the sole beneficiary of his superannuation fund. The Tribunal notes that, in this review, the applicant submitted a number of documents which corroborate these various claims. He submitted documents such as a statement for their joint bank account for the period 21 September 2020 to 12 November 2020 showing the deposit of his salary from [Company 1] into the account as well as other transactions; joint utility bills; evidence of car insurance and health insurance as well as evidence that he had nominated the sponsor as the sole beneficiary of his superannuation.
30. The applicant told the Tribunal that, during the week, the sponsor did most of the cooking and that, on weekends, he did most of the cooking. He said that he liked to cook and noted that they had HelloFresh boxes delivered to the house. He said that the sponsor loved to eat pizza and lasagne. In terms of other activities in their spare time, he noted that the sponsor liked to buy things, fix them and then sell them; that they liked to walk at a nearby park; go to the beach and go shopping. He said that the sponsor loves shopping and that when it is her birthday, they go to Chadstone. The Tribunal notes that, in this review, the applicant has submitted four photographs of the parties together in different locations, including inside a car, a park and a shopping centre.
31. The applicant also provided oral evidence about the degree of emotional support that he draws from the sponsor. He said that not being able to leave Australia and visit his parents was 'pretty rough'. He said that the sponsor was the one person that he could talk to and that she helps him to clear his head, when he wants to take his mind off his worries.
32. He said that he viewed his relationship with the sponsor as being for the long term. He said that he wanted to buy a house and open a [business] for the sponsor so that she could stay at home when her daughter was there.
33. The sponsor told the Tribunal that they had been friends at first but that the relationship developed, and they fell in love. When the Tribunal asked her whether she had ever had any concerns that the applicant may be in the relationship for the primary purpose of obtaining a positive migration outcome, she stated that she thought that the question was rude and that she knew, '100%', that that was not the case. She said that the applicant would not put up with half the things that he endures if that was the case. She also said that it had been her idea to marry as she thought that it would bring more stability to their lives.

34. She said that they lived together in [Suburb 4] after the marriage but that before this time, they were 'pretty much' mostly together. She gave oral evidence that was consistent with the applicant's oral evidence in respect of their small registry wedding in [Suburb 2] and the names of their guests and going out for dinner in [Suburb 3] afterwards. She also gave similar oral evidence to the applicant in terms of their interaction with each other's family, saying that she spoke to the applicant's family monthly by video call and that the main person that they were in contact with in her family was her sister.
35. She told the Tribunal that they did not own real estate but that they wanted to buy a property. She noted that their car loan was paid off and that the car was registered in the applicant's name. She said that she could not drive. The Tribunal notes that it is curious that the applicant has provided evidence of car insurance for the period 18 March 2020 to 18 March 2021, showing that the sponsor is also insured, if she cannot drive. (The earlier statement, with respect to the period 13 July 2018 to 13 July 2019, listed the applicant only). The Tribunal did not ask either party about this aspect of the evidence.
36. The sponsor said that they had no joint loans or credit cards. She gave oral evidence that they had had a joint bank account with the [Bank 1] but now their account was with [Bank 2] because it is the better option for a home loan. She said that their joint bank account was used for both everyday transactions and savings.
37. She told the Tribunal that the applicant's wages, from his job as a night manager in [Company 1] in a named suburb in the eastern suburbs of Melbourne, were deposited into their joint bank account with [Bank 2]. She said that they paid for their groceries, including their HelloFresh boxes, from this account. In terms of bills, she noted that she pays the electricity bill from her personal account. She said that the applicant would give her money to pay for the bill if she did not have sufficient.
38. With respect to the responsibility for housework, the sponsor said that the applicant cooked more than she did as he was a better cook. She said that she did a lot of cleaning but that, when they had her daughter living with them, the applicant would do it.
39. In terms of joint social activities, she noted that she liked to go shopping but that the applicant did not really like it. She said that COVID-19 had made it difficult to do many activities but that they liked doing 'normal things' like 'hanging out', going for walks and out for dinner. When asked about mutual friends, she named some friends, but said that they did not have a lot of time to meet up with them.
40. She also provided oral evidence about the degree of emotional support that she draws from the applicant. She said that it was 'massive' for her to have someone who could support her emotionally. She said that, before meeting the applicant, she had not really had anyone in her life who could give her emotional support. She said that she viewed the relationship as being a long-term relationship and that she wanted to remain married to the applicant 'forever'. She said that she wanted certainty in their lives so that she could have a baby.
41. The Tribunal is mindful of the practice direction made by the President of the Tribunal entitled *Conducting Migration and Refugee Reviews President's Direction*. Clause 8.2 of this direction provides:

As a general rule, where the Minister for Immigration ... or delegate has made an adverse decision on particular criteria or issues, the AAT should restrict its review to those matters.

42. Accordingly, the Tribunal has not made any critical assessment of whether, at the time of application or at the time of this decision, the parties were in and continue to be in a genuine, continuing and exclusive relationship.
43. The Tribunal notes that, even if the parties are in a genuine and continuing relationship, this is not of itself a compelling reason for not applying Schedule 3 criteria. This is because it is already a criterion which must be satisfied in order to meet the time of application criterion in cl.820.211(2)(a) and the time of decision criterion in cl.820.221(1).
44. From all the evidence before it, the Tribunal is satisfied that, prima facie, the applicant and sponsor are in a long-standing relationship which has been in existence for around six years and that this evidence, together with the reasons discussed below, constitutes compelling reasons to waive the Schedule 3 criteria.

45. *The sponsor's daughter with disability*

46. At the hearing, the applicant told the Tribunal that the sponsor's daughter is [age] years of age. The applicant told the Tribunal that the sponsor's daughter has Cerebral Palsy which means that she cannot talk or walk. He said that she was assisted with a wheelchair and could read with special equipment. He said that the sponsor's daughter had graduated from school and he explained that this meant that her care needs had increased as she was at home all the time now that she was no longer attending school.
47. The signed and stamped 'to whom it may concern' letter from the sponsor's named doctor at [a named] Medical Centre, dated 27 January 2017, which is on the Department's file outlines the sponsor's daughter's medical conditions. It states:
48. Her Daughter, [name omitted] is diagnosed with severe cerebral palsy with very little body movement and Oral motor dysfunction from birth. Because of her lack of voluntary movement, she requires 24 hours of care.
49. In the primary decision, the delegate noted that they had considered the applicant's claim that, since the father of the sponsor's daughter was incarcerated for three months in July 2016, the applicant had taken on a carer's role for the sponsor's daughter. However, the delegate did not consider this to be a compelling reason to waive the Schedule 3 criteria. The delegate accepted that the sponsor's daughter had been diagnosed with Cerebral Palsy but did not consider that there was convincing evidence to support the applicant's claim about his level of involvement in the child's life. Further, the delegate noted that 'no information has been provided as to the child's relationship or access with her biological father since his release from prison'.
50. In this review, the applicant did not appear to pursue a claim that he has a carer's role for the sponsor's daughter. Rather, documentary evidence was submitted, and oral evidence given which suggested that the applicant was an important support to the sponsor so that she could provide care and support to her daughter. The Tribunal notes that evidence in relation to such a claim had been submitted earlier. For example, the doctor who provided the statement dated 27 January 2017 had stated that they 'strongly' believed that it was important for the applicant to stay with the sponsor as it helps the sponsor to 'cope' with her daughter.
51. At the hearing, the applicant and the sponsor gave consistent oral evidence that the sponsor's daughter lived with her mother (the sponsor) four days a week and with her father (the sponsor's former partner) four days a week. The sponsor said that this arrangement had been in place for around two years.

52. When the Tribunal asked the applicant about the role of the daughter's carer [Ms E], he gave oral evidence that she attended the home up to three times a week, depending on their need requirements. He gave details of the times and days. He said that, in 2020, [Ms E] had not attended so frequently because of COVID-19. He explained that [Ms E]'s services were paid for by the NDIS (the National Disability Insurance Scheme).
53. The applicant gave oral evidence that, when the sponsor's daughter stayed with them, he assisted the sponsor. He said that, at these times, he did more of the housework, citing washing the dishes. He said, 'if she is exhausted, I'll help her'.
54. The sponsor gave oral evidence that she and the applicant worked better together; when they could support one another. She said that the applicant was a 'big help to me' in terms of the care and support she needs to provide to her daughter. She said, 'when he is there, if he is there for me, he does help my daughter'.
55. The Tribunal notes that, amongst other things, [Ms E] stated:
56. I care for [the sponsor's daughter] several times a week. During the time spent with all three I can see [Ms A] and [the applicant] work well as a couple to make a better life for themselves. [The applicant] helps [Ms A] with day to day living which then enables her to focus more on her daughter and spend more time with her, which is most important to [Ms A].
57. The Tribunal accepts the evidence that is before it, including the parties' oral evidence, in this regard. This leads the Tribunal to consider whether the sponsor's reliance on the applicant constitutes a compelling reason for the waiver of the Schedule 3 criteria.
58. *The sponsor's reliance on the applicant*
59. The earlier mentioned letter from the sponsor's doctor, dated 27 January 2017, also states:
60. [The sponsor] has been full-time care[r] of her daughter with great responsibilities, which she was exhausted with physically and mentally and also struggling with her disabled daughter and her own life prior to her marriage.
61. After the marriage, I can see a significant improvement of [the sponsor's] physical health as well as mental health, which also influence her daughter in many ways. With the help of her husband, she is spending more time on her daughter's care now and also improving [the sponsor's] health as well.
62. The doctor stated that they 'strongly' believed that it was important for the applicant to stay with the sponsor as it helps the sponsor to cope with her 'day to day' life.
63. In the primary decision, the delegate noted the claim that the sponsor's mental health had improved since the parties' marriage but the delegate expressed concerns with the documentary evidence that had been provided, including stating that the letter from the doctor was 'of little evidentiary value to demonstrate the level of care and support your sponsor requires or the intensity of care and support you provide to your sponsor'.
64. Presumably with respect to any implied claim of financial reliance by the sponsor on the applicant, the delegate also noted that a utility bill had been provided for October to early November 2016 and a bank statement for the month of January 2017. The delegate did not find this evidence to be compelling for the waiver of the Schedule 3 criteria.

65. As noted earlier in these reasons, at the hearing, the applicant gave oral evidence that the sponsor had experienced difficulties with her mental health, including having been treated for depression with medication, but that, since their marriage, 'she is doing really great'. When asked about the medication, the applicant stated that, for about two to three months, the sponsor had used 30ml of a named drug. He said that she had taken the tablet at night. He said that the medication had made the sponsor drowsy. At the time of the hearing, he said that she had not used the medication for around two and a half years. He said that, in the past, the sponsor had seen a counsellor but that, at the time of the hearing, the sponsor had not seen a doctor for almost three years.
66. With respect to the sponsor's mental health, she explained that, when they had been newly married and had wanted to move forward in their lives, they were 'held back'. She said that she had felt the weight of various issues, including the applicant's uncertain visa status. She told the Tribunal that she had seen a doctor and a counsellor and had taken a named medication (daily at night) but that she did not like taking the medication and later felt that she did not need to take it. She said that she still attends the named doctor but that she no longer needed medication and that her mental health was 'not a big thing anymore'. She told the Tribunal that the applicant supported her emotionally. The Tribunal also notes that, prior to the hearing, the applicant submitted an undated, signed 'to whom it may concern' statement made by the sponsor where she stated that the sponsor had helped her both 'physically and more importantly mentally'.
67. The Tribunal notes and gives some weight to the signed and stamped letter, dated 22 January 2021, from the same doctor who had made the earlier statement. The doctor stated:
68. I have known [Ms A] for many years and [the applicant] for over four years. [Ms A] have visited me several time regarding her mental health before the marriage to [the applicant].
69. After the marriage I can see a significant improvement of [Ms A]'s mental health. That help her to have an improved life. Since the marriage her visits to doctors have significantly reduced. That's a good indication that [Ms A] improving psychologically. I can see she is now mentally and emotionally very stable.
70. I strongly believe it is important [the applicant] to stay with [Ms A] as he supports her with mentally and emotionally.
71. The Tribunal notes that no documentary evidence has been submitted to corroborate the parties' claims that there was a period when the sponsor took medication to assist her with her mental health.
72. With respect to financial support, both the applicant and the sponsor told the Tribunal that the sponsor received a carer payment from the Government (around \$600 a fortnight). The applicant said that the sponsor kept her payments from the Government in a separate account where they could be used for the care of her daughter. The sponsor said that this was her main source of income and also noted that these monies were deposited into her own bank account with the Commonwealth Bank. The applicant noted that they lived in public housing and he said that the rent was taken from the sponsor's bank account. They both also said that \$375 was taken from the sponsor's entitlement to pay for their housing.
73. The applicant said that, at the time of the hearing, he had the right to work in Australia so was working full time at [Company 1]. He said that he was working as a 'Night Fill Manager' in a named store in the eastern suburbs of Melbourne. He said that his long commute (which he said was about one hour along the M1) was one reason that they wanted to move from

[Suburb 4]. He said that he had had an opportunity to be an Assistant Store Manager but the uncertainty of his visa status, specifically holding a Bridging E visa, had meant that he had not been able to realise such opportunities. He said that he wanted to progress his career at [Company 1] and move from a [store] in the south-eastern suburbs of Melbourne to somewhere closer to home. He told the Tribunal that he assisted the sponsor financially, noting that his salary was deposited into their joint bank account and that the sponsor also used money from this account. The Tribunal notes the statement for the joint bank account with [Bank 2] for the period 21 September 2020 to 12 November 2020 which evidences that the applicant's salary from [Company 1] was deposited into the account. The applicant told the Tribunal, 'whatever [Ms A] wants, I help her'. He also said that the parties were prevented from making certain decisions about their future because of his uncertain visa status and that this was 'not good for her [meaning the sponsor] as well'.

74. The Tribunal notes that [Ms E], [Mr D], [Ms C] and [Mr B] all made statements to the effect that the applicant's presence in Australia was a support to the sponsor.
75. From the evidence provided, the Tribunal accepts that the applicant provides the sponsor with various forms of support and care and that this, in turn, assists the sponsor to provide care and support to her daughter with disability. The Tribunal is satisfied that, to some extent, the sponsor is reliant on the applicant for her emotional and financial stability. The Tribunal considers that, from the evidence before it, it would be detrimental to the sponsor's mental health and financial situation if the applicant were required to depart Australia in order to apply for a Partner visa offshore. The Tribunal considers that these circumstances are compelling reasons to waive the Schedule 3 criteria in this case.

76. *The applicant's immigration history*

77. As noted earlier, the applicant's Student visa ceased on 9 June 2012. The applicant's immigration history is detailed in full in the primary decision. It states:
78. Departmental records indicate your immigration history is as follows:
- [In] July 2008, you arrived in Australia on a Higher Education Sector (Subclass TU 573) visa valid until 15 March 2012.
 - Within six months, you withdrew from your pathway course.
 - On 14 March 2012, whilst onshore, you applied for a Vocation Education and Training Sector (Subclass TU 572) visa.
 - On 21 May 2012, the department was advised, you had failed to enrol in your chosen course.
 - On 9 June 2012, you lodged a [temporary] Visa, which was refused 3 January 2013.
 - On 24 January 2013, you [sought] review of this decision with the Migration Review Tribunal (MRT).
 - [In] April 2013, you departed Australia on a Bridging (Subclass B) Visa valid until 1 November 2013. You returned to Australia [in] May 2013.
 - [In] October 2013 the MRT affirmed the department's decision relating to your [temporary] Visa.

- On 2 November 2013, your Bridging Visa B ceased and you remained in Australia unlawfully.
- [In] October 2014, you [sought] a Judicial Review of the decision on your [temporary] visa application and the Minister withdrew [in] February 2015.
- [In] February 2015, the MRT re-reviewed the department's decision and [in] April 2015, the MRT re-affirmed their initial decision.
- [In] June 2015, you [sought] Judicial Review with the Full Federal Court and [in] September 2016, your Judicial Review resulted in a Minister's win.
- On 4 November 2013, you lodged an application for a Bridging (Subclass E) Visa to remain lawful within Australia.
- From 4 November 2013 to 12 June 2018, you applied and were granted 15 Bridging (Subclass E) Visa to remain lawful within Australia.
- 19 days after your Judicial Review result, you lodged a Combined Partner (Subclass 820/801) visa application on 8 November 2016.
- You currently remain the holder of a Bridging (Subclass E) Visa.

79. At the hearing, the Tribunal asked the applicant to outline his immigration history. He explained that he had arrived in Australia to study a course in [Discipline 1] but that the school had closed. He said that there had been a meeting at the Melbourne Town Hall with Immigration because the named group which had owned the [school] had also owned a number of other institutions. He said that he needed to finish his Diploma. He said that he was advised 'by the Government', that if he found another school on his own initiative that he would lose all of his money expended. He said that he waited for about six months and then undertook a Diploma at a named institution in [address], Melbourne. However, he said that this institution did not provide him with a Certificate III. He outlined other aspects of his immigration history, such as not attending his hearing at the MRT because he had been sick with tonsillitis. He said that, for 5–6 days, he had not known that his Bridging Visa B had ceased. He explained that he had written to the Minister but that the Minister 'refused'. He said that he went to Court but that the Judge had said that he did not need to go to Court. He said that, a year later, his application was refused again. He outlined other aspects of his immigration history, including noting that he had obtained a lawyer and later had a reporting condition for a while. He said that he had waited until November (2016) before lodging his application for the Partner visa because he had wanted to find out the outcome from the Court first. He said that both he and the sponsor had been through a lot by this stage. The Tribunal notes that the applicant gave oral evidence which could be said to accord with his understanding of the chronology of events that are detailed in the delegate's refusal decision.

80. The Tribunal has had regard to the Department's policy but the Tribunal does not place much weight on the applicant's short period/s of unlawfulness in making this decision in view of the evidence that the sponsor (and by extension, her daughter with disability) rely on the applicant for various forms of support and care.

CONCLUSION

81. The Tribunal is satisfied that there are compelling reasons for not applying the Schedule 3 criteria. Accordingly, the applicant meets cl 820.211(2)(d)(ii).

82. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

83. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl.820.211(2)(d)(ii) of Schedule 2 to the Regulations

84.

Justine Clarke
Member

ATTACHMENT - Extract from Migration Regulations 1994

Schedule 3

3001

- (1) The application is validly made within 28 days after the relevant day (within the meaning of subclause (2)).
- (2) For the purposes of subclause (1) and of clause 3002, the relevant day, in relation to an applicant, is:
 - (a) if the applicant held an entry permit that was valid up to and including 31 August 1994 but has not subsequently been the holder of a substantive visa — 1 September 1994; or
 - (b) if the applicant became an illegal entrant before 1 September 1994 (whether or not clause 6002 in Schedule 6 of the Migration (1993) Regulations applied or section 195 of the Act applies) and has not, at any time on or after 1 September 1994, been the holder of a substantive visa — the day when the applicant last became an illegal entrant; or
 - (c) if the applicant:
 - (i) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
 - (ii) entered Australia unlawfully on or after 1 September 1994;whichever is the later of:
 - (iii) the last day when the applicant held a substantive or criminal justice visa; or
 - (iv) the day when the applicant last entered Australia unlawfully; or
 - (d) if the last substantive visa held by the applicant was cancelled, and the Tribunal has made a decision to set aside and substitute the cancellation decision or the Minister's decision not to revoke the cancellation — the later of:
 - (i) the day when that last substantive visa ceased to be in effect; and
 - (ii) the day when the applicant is taken, under sections 368C, 368D and 379C of the Act, to have been notified of the Tribunal's decision.

3003

If:

- (a) the applicant has not, on or after 1 September 1994, been the holder of a substantive visa; and
- (b) on 31 August 1994, the applicant was either:
 - (i) an illegal entrant; or
 - (ii) the holder of an entry permit that was not valid beyond 31 August 1994;

the Minister is satisfied that:

- (c) the applicant last became an illegal entrant, or, in the case of a person referred to in subparagraph (b)(ii), last became a person in Australia without a substantive visa, because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with the conditions that apply or applied to:
 - (i) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (ii) any subsequent bridging visa; and
- (f) the applicant would have been entitled to be granted an entry permit equivalent to a visa of the class applied for if the applicant had applied for the entry permit immediately before last becoming an illegal entrant or, in the case of a person referred to in subparagraph (b)(ii), if the applicant had applied for the entry permit on 31 August 1994; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) the last entry permit (if any) held by the applicant was not granted subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.

If the applicant:

- (a) ceased to hold a substantive or criminal justice visa on or after 1 September 1994; or
- (b) entered Australia unlawfully on or after 1 September 1994 and has not subsequently been granted a substantive visa;

the Minister is satisfied that:

- (c) the applicant is not the holder of a substantive visa because of factors beyond the applicant's control; and
- (d) there are compelling reasons for granting the visa; and
- (e) the applicant has complied substantially with:
 - (i) the conditions that apply or applied to:
 - (A) the last of any entry permits held by the applicant (other than a condition of which the applicant was in breach solely because of the expiry of the entry permit); and
 - (B) any subsequent bridging visa; or
 - (ii) the conditions that apply or applied to:
 - (A) the last of any substantive visas held by the applicant (other than a condition of which the applicant was in breach solely because the visa ceased to be in effect); and
 - (B) any subsequent bridging visa; and
- (f) either:
 - (i) in the case of an applicant referred to in paragraph (a) — the applicant would have been entitled to be granted a visa of the class applied for if the applicant had applied for the visa on the day when the applicant last held a substantive or criminal justice visa; or
 - (ii) in the case of an applicant referred to in paragraph (b) — the applicant would have satisfied the criteria (other than any Schedule 3 criteria) for the grant of a visa of the class applied for on the day when the applicant last entered Australia unlawfully; and
- (g) the applicant intends to comply with any conditions subject to which the visa is granted; and
- (h) if the last visa (if any) held by the applicant was a transitional (temporary) visa, that visa was not subject to a condition that the holder would not, after entering Australia, be entitled to be granted an entry permit, or a further entry permit, while the holder remained in Australia.